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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANGEL ESTRADA COLON, Defendant and Appellant.	B255731 (Los Angeles County Super. Ct. No. BA414083)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Hart J. Levin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Myoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Angel Estrada Colon (defendant) appeals from his conviction of narcotics offenses. He contends that his Sixth Amendment right to notice of the nature of the charges against him was violated when the trial court instructed the jury on a new theory of liability (aiding and abetting) after deliberations had begun. We reject defendant's constitutional claim as forfeited and without merit; and we determine that the trial court acted within its discretion to give aiding and abetting instructions in response to a jury question after deliberations had begun. Finding no abuse of discretion, we affirm the judgment.

BACKGROUND

Defendant was charged with seven felony violations of the Health and Safety Code, as follows: count 1, selling, transporting, or offering to sell cocaine in violation of section 11352, subdivision (a); count 2, possession for sale of cocaine in violation of section 11351; count 3, selling, transporting, or offering to sell heroin in violation of section 11352, subdivision (a); count 4, possession for sale of heroin in violation of 11351; count 5, selling, transporting, or offering to sell methamphetamine in violation of section 11379, subdivision (a); count 6, possession for sale of methamphetamine in violation of section 11378; and count 7, false compartment activity in violation of section 11366.8, subdivision (a). In addition, the information alleged as to counts 1 and 2 that the cocaine exceeded 10 kilograms by weight within the meaning of section 11370.4, subdivision (a)(3). As to counts 5 and 6, it was alleged that the substance containing methamphetamine exceeded one kilogram within the meaning of section 11370.4, subdivision (b)(1).[1]

A jury found defendant guilty of all counts as charged and found true the special allegations. On April 14, 2014, the trial court denied probation and sentenced defendant as to count 1 to a total term of 14 years in county jail, comprised of the middle term of

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[1] As to counts 3 and 4, the information further alleged that in the commission of the offenses, defendant possessed for sale 14.25 grams or more of a substance containing heroin within the meaning of section 11352.5, subdivision (1), and Penal Code section 1203.07, subdivision (a)(1). However, the prosecution did not proceed on the special allegations relating to such counts and they were not included in the verdict forms.

four years, enhanced by 10 years due to the true finding that the weight of the cocaine exceeded 10 kilograms. The court imposed and stayed the following terms pursuant to Penal Code section 654: as to count 2, the high term of four years plus the 10-year weight enhancement; as to count 4, the high term of four years; and as to count 6, the high term of three years, plus a three-year weight enhancement. The court imposed the following terms to run concurrently with the term imposed as to count 1: as to count 3, the middle term of four years; as to count 5, the high term of four years, plus a three-year weight enhancement; and as to count 7, the middle term of two years. Defendant was given a total of 392 days of custody credit, and ordered to pay mandatory fines and fees.

Defendant filed a timely notice of appeal.

Prosecution evidence

Torrance Police Officer Kent Krumbach was conducting narcotics surveillance in Downey on October 4, 2012. At approximately 11:48 a.m., he observed defendant driving alone in a silver Dodge Avenger. After stopping for gas, defendant entered the I-5 freeway and drove north. Officer Krumbach followed him for about 45 minutes, during which time a green Toyota Sienna minivan was seen close to defendant's car, maintaining the same speed. After defendant was stopped by the California Highway Patrol (CHP), Officer Krumbach continued to follow the minivan as it exited at the next off-ramp. Once the van was parked in a shopping center, three Latino men came out and entered a restaurant. The men never returned to the minivan and were not detained.

The same day CHP Officer Richard Cheever was working with his canine partner, Flash, who was trained to detect drugs such as marijuana, cocaine, heroin, and methamphetamine, on the I-5 freeway in Santa Clarita, a thoroughfare of narcotics trafficking known as the "Pipeline." Officer Cheever testified that at about 12:45 p.m., he conducted a traffic stop after he saw defendant following another car too closely. As defendant drove off the freeway he appeared to be sending a text message, which he continued to do after stopping his car. Once Officer Cheever got defendant to lower his window, the officer noticed a strong odor of gasoline and a single key in the ignition. In his experience a gasoline odor was often present when the gas tank area was being used

to secrete drugs. A single key suggested the driver did not own the car. Defendant produced his driver's license, proof of insurance, as well as the car's registration, in a name not defendant's. Defendant told Officer Cheever that he bought the car for approximately $4,000 about two weeks earlier in Fresno.

Suspecting defendant of possessing narcotics, the officer called for backup and had defendant exit the car. While writing a citation, Officer Cheever asked defendant whether he had anything like marijuana, cocaine, heroin, or methamphetamine in his possession. Defendant denied that he did and consented to a search of the car. Officer Cheever then instructed Flash to sniff the exterior of the car. After Flash alerted near the right front door seam, Officer Cheever instructed him to sniff the interior, where he alerted to an area behind the driver's seat. Since Officer Cheever observed that the two areas appeared to be modified in a way that suggested hidden compartments, he had the car towed to the nearby CHP station for a more detailed search. Given the option to accompany the officer or leave, defendant opted to leave. The later search revealed two compartments covered with putty, paint and carpet, both containing packages of narcotics.

Los Angeles Sheriff's Department chemist Victor Wong tested the narcotics found in the Dodge and determined that the packages contained 911 grams of heroin; 3,451 grams of a substance containing methamphetamine; 9,891 grams of powder containing cocaine; and 1,976 grams of another powder containing cocaine.

Officer Cheever also testified as an expert in the transportation, possession, and sales of narcotics, and the use of false compartments. The prosecutor presented him with two hypothetical questions. First, given the amounts of heroin, methamphetamine, and powdered cocaine recovered, he estimated the wholesale value of the narcotics at approximately $450,000, and the street value at about one million dollars. In addition, assuming all the facts in evidence, he was of the opinion that the driver of the car was in possession of the narcotics for the purpose of transporting them for sale; and due to the great quantity of narcotics, the single key in the ignition, the area where the car was

stopped, and the driver's lack of ownership of the car, it was also Officer Cheever's opinion that the car had been loaded with the drugs before it was given to the driver.

Torrance Police Department Detective Daniel Vazquez was present when Officer Cheever stopped defendant. He too testified as an expert in narcotics trafficking organizations, smuggling methods, and distribution. Detective Vazquez explained that smugglers typically chose large used or salvaged vehicles, installed hidden compartments to conceal narcotics, and then hired a courier to drive the vehicle. Assuming the street value of the narcotics to be transported was about a million dollars, the smugglers would likely chose a trusted person within their organization to be the driver. Typically, drivers did not own the cars used to transport narcotics. "Follow-vehicles" would assist by looking out for law enforcement and sometimes by attempting to obstruct or divert officers. As the drivers are responsible for the cargo and were usually paid according to the amount of narcotics being transported, Detective Vazquez thought it was unlikely that a driver would be ignorant of the nature and amount of the cargo.

Detective Vazquez heard all the evidence in this trial, and based on such evidence it was his opinion that defendant had been hired as a courier, knew that he had a follow-vehicle near him, and thus knew he was transporting a large amount of narcotics.

Defense evidence

Defendant presented three character witnesses. His cousin Mauricio de la Rosa testified that defendant's reputation for honesty was good, and that he was trustworthy and a good construction worker. De la Rosa had never known defendant to have any problems with drugs, to take driving trips to Fresno, to drive a Dodge Avenger, or to work as a courier or driver.

Wendy Hernandez testified that defendant was her brother-in-law and her children's godfather, and in the nine years she had known him, he was never known to be involved with illegal drugs. He was hard-working, a good person, responsible with his children, and trustworthy with her children. She was not aware of defendant's driving to Fresno and knew of no reason he would have to go there. He owned a black Honda.

Gloria Villalta testified that she had known defendant for 11 or 12 years, and he was the former husband of one of her daughters. He was a good person and a good worker, honest and responsible. He visited every weekend and she trusted him with her grandchildren. She knew of no reason that defendant would visit the Fresno area and she knew of no family he might have there. He drove a white Toyota Corolla.

Defendant testified that a few months before October 4, 2012, he was introduced at a party to a man named Daniel, who was looking for someone with a license to drive cars to Fresno as Daniel's license had been suspended. Daniel said he was in the business of buying and selling cars and asked defendant whether he would drive a Dodge for him from Los Angeles to Fresno for a fee of $300. Defendant believed him because he had seen Daniel in different cars. Daniel had done nothing to lead defendant to believe that he was involved in narcotics. Defendant claimed that the Dodge Avenger was the first car he drove for Daniel. He testified that in 2012, he owned a black 1998 Honda Accord with 200,000 miles on it. In September 2013, he bought a new white Toyota Corolla from a dealer and registered it in his name.

On the morning of October 4, 2012, Daniel picked up defendant and although he was unlicensed, Daniel drove defendant to within one block of where the Dodge was parked. There, Daniel gave defendant the key and gas money and left, saying he was going to pick up a friend. Defendant also testified that "they" gave him the key and gas money. The interior of the car smelled of glue, new carpet, and gasoline, which defendant did not find that odd, as he knew the car had been salvaged. Defendant denied knowing that recent work had been done on the car. As defendant was unfamiliar the with Fresno area, Daniel instructed him to stop at a gas station and call from there. Daniel would then meet him. Daniel offered to sell the car to defendant, who wanted to buy it but did not have enough money. Defendant told Daniel that he might buy it after he returned from Fresno.

The green Sienna got on the freeway at the same time as defendant and followed him. Defendant did not recognize anyone in the van, but assumed it was Daniel and his friends on their way to Fresno. Defendant testified that the people in the van looked at

him constantly, or twice. Defendant explained that when he appeared to be "texting" after Officer Cheever initiated the stop, he was instead attempting to lower the volume of the music on his cell phone. Defendant told the officer that the Dodge was his, that he had bought it two weeks earlier for $4,000. He did not mention Daniel or say he was driving the car for someone else. Defendant explained that he lied to the officer because the car was not registered in his or Daniel's name, and he did not know whether Daniel's business was legal or where Daniel had obtained the car. Defendant also explained that he thought of the car as his own because he was thinking of buying it when he returned from Fresno if Daniel were unable to sell it there. Defendant denied knowing that the car contained methamphetamine, cocaine, heroin, any illegal narcotic, or anything else illegal.

After the car was towed, Officer Cheever gave defendant the option of going to the police station while they conducted a thorough search of the car or of going home on his own. Defendant took a bus home. Defendant placed a call to Daniel, but there was no answer. Defendant called the CHP about recovering the Dodge and was told he could have it back for $200, but that was more than he had. Later, Daniel called defendant from a Mexican number, different from the number he had previously used. Sounding angry, Daniel said "Get the money, and I will help you when I come back." However, when defendant obtained the money and called the CHP a second time, he was told that he could not have the car because they found drugs. Defendant testified he was surprised and asked "What is going to happen to me?" The response was, "That is your problem, sir." Defendant had no further communication with Daniel, and never told law enforcement about Daniel or the people who introduced them.

DISCUSSION

Defendant contends that the trial court erred in instructing the jury on a new theory of liability after deliberations had begun. Defendant also contends that the timing of the instructions resulted in a denial of his right under the Sixth Amendment of the United States Constitution to be informed of the nature of the charges against him and to have a reasonable opportunity to prepare and present a defense.

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; see also *People v. Beeman* (1984) 35 Cal.3d 547, 561; Pen. Code, § 31.)

The prosecution had not relied on aiding and abetting as a theory of liability. Instead the trial court raised the new theory after the deliberating jury sent out the following question regarding counts 2, 4, and 6 (the charges of possession for sale): "Does the individual need [to] intend to sell drugs personally or is it a distinction between personal use[?]"[2] The trial court suggested reading two instructions regarding aiding and abetting. The court overruled defense counsel's objection to the instructions, but as no one had argued that theory of liability, the court allowed each side 10 minutes to present argument on that point.

The court read CALCRIM No. 400 and CALCRIM No. 401, which correctly state the law. (See *People v. Loza* (2012) 207 Cal.App.4th 332, 349-350.) At defense counsel's request, the trial court added the following modified language:

> "If the specific intent crime is aided and abetted, the aider and abettor must share the requisite specific intent with the perpetrator. An aider and abettor will share the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or

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2 The jury was not required to find that defendant personally intended to sell the narcotics as there is "no meaningful distinction in culpability between the individual who holds the drugs to sell personally and the one who holds them for others to sell." (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1732, fn. 4; see also, *People v. Parra* (1999) 70 Cal.App.4th 222, 226.) Health & Safety Code section 11351, as charged in counts 2 and 4, and section 11378, as charged in count 6, prohibit possession "for sale" not "possession with intent to sell." (*People v. Perez* (2005) 35 Cal.4th 1219, 1231.) The trial court instructed with CALCRIM No. 2302 prior to closing arguments, apparently causing the jury's confusion regarding intent to sell by stating without further explanation that the prosecution must prove, among other elements, that "when the defendant possessed the controlled substance, he intended to sell it."

encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime."

The prosecutor and defense counsel then presented supplemental argument based on the additional instructions.

As defendant did not claim a violation of his Sixth Amendment right to be informed of the nature of the charges against him when he objected to the instructions, he did not preserve that contention for review. (See *People v. Carroll* (2007) 158 Cal.App.4th 503, 511.) In any event, we reject any suggestion that the charging document was required to include an aiding and abetting theory as a prerequisite to presenting such theory. "Under California's practice of short-form pleading, an instrument charging a defendant as a principal is deemed to charge him as an aider and abettor as well. ([Pen. Code,] § 971.)[3] Thus 'notice as a principal is sufficient to support a conviction as an aider and abettor . . . ". . . without the accusatory pleading reciting the aiding and abetting theory . . . ."' [Citations.]" (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70, quoting *People v. Garrison* (1989) 47 Cal.3d 746, 776, fn.12; see §§ 971, 952.) Notice of the theory can be adequate when it is expressly mentioned or evidence supporting it is presented sufficiently in advance to permit defendant to prepare a defense and an appropriate closing argument. (See *People v. Quiroz, supra*, at pp. 70-72.) Due process is satisfied so long as the defendant is neither affirmatively misled nor "ambushed" by the People. (*Id*. at p. 71.)

Here, defendant does not contend that he was ambushed, misled, or surprised by the theory, and our review of the trial evidence demonstrates that he had adequate notice that he was accused of knowingly having facilitated the crimes of accomplices. Defendant was paid to drive a car to Fresno, was unconcerned about the smell of gasoline inside the car; he was closely followed by others who appeared to be interested in the operation; defendant appeared to send text messages while being pulled over; and he lied to Officer Cheever about owning the car. Detective Vazquez testified at length in the

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3 All further statutory references are to the Penal Code, unless otherwise indicated.

prosecution's case-in-chief regarding the typical operation of drug smuggling organizations. He had heard all the evidence at trial, including the observation of the apparent follow-vehicle, the very large quantity of narcotics, the manner in which they were hidden, and defendant's false claim that the car was his. He was of the opinion that such evidence suggested an organization had hired defendant as a courier under circumstances that would make it unlikely that he would be ignorant of the nature and amount of the cargo. Thus, defendant received adequate notice of the nature of the charges against him as well as any derivative liability as an aider and abettor.

Further, any suggestion of surprise is dispelled by the theory advanced by the defense prior to supplemental instruction and argument. Defendant testified about his ignorance of any criminal purpose of Daniel and the occupants of the follow-vehicle. Defense counsel's closing argument was responsive to the evidence of defendant working with accomplices, arguing that the traffickers would be more likely to hire an ignorant courier who would not give himself away by appearing nervous, and that the follow-vehicle was most likely a security detail to keep defendant from absconding with drugs or money.

It is important to emphasize here that defendant does not contend that the instructions were an incorrect statement of law or that substantial evidence did not support them. The same prosecution evidence that we found to provide adequate notice would have supported giving the instructions if the prosecution had requested them prior to closing arguments, as "instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.' [Citation.]" (*People v. Delgado* (2013) 56 Cal.4th 480, 488.) Thus, the only issues raised by defendant's challenge concern the timing of the instructions.

Under sections 1093 to 1094, the trial court has wide discretion concerning the timing of its instructions to the jury. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 127-128 (*Ardoin*).) Section1093, subdivision (f), provides for reading requested instructions to the jury after argument, and also permits the court to give instructions without request

during the trial as the court deems necessary for the jury's guidance. Section 1093.5 requires the parties to submit instruction requests to the court prior to argument, but allows the court to give additional instructions regarding issues raised which were not covered by the instructions previously given or refused. Section 1094 permits the court to "'depart from the usual order of trial set forth in section 1093 "for good reasons, and in the sound discretion of the Court." [Citation.]' [Citations.]" (*Ardoin, supra*, at p. 127.) An issue similar to that raised here arose in *Ardoin*, where the trial court had given a modified instruction regarding a felony murder theory after the jury expressed confusion during deliberations. (*Ibid*.) Finding no abuse of discretion, the appellate court noted that a trial court may give any instruction for which there is evidentiary support, even when the parties did not advance the particular theory, and it further explained: "When presented with the jury's inquiry, the trial court had the statutory obligation [under] 'section 1138 . . . "to clear up any instructional confusion expressed by the jury." [Citation.]' [Citation.]" (*Ardoin, supra*, at pp. 127-128.)

Like the *Ardoin* court, we review the timing of the reading of the aiding and abetting instructions for an abuse of discretion. It is defendant's burden to establish an abuse of discretion by demonstrating that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Defendant has not met his burden. There was nothing irrational or arbitrary in giving additional instructions after deliberations had begun and the jury expressed confusion, since the trial court was required to provide clarification. (*Ardoin, supra*, 196 Cal.App.4th at pp. 127-128; § 1138.) In addition, the trial court was required to instruct sua sponte "'on all general legal principles raised by the evidence and necessary for the jury's understanding of the case.' [Citations.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 265; see § 1093.) As we have previously determined, substantial evidence supported the giving of aiding and abetting instructions, which clarified for the jury that it need only find that defendant's intent was to possess narcotics for sale, not to personally

sell them. The instructions were thus appropriate to the particular issue, and the trial court satisfied its obligations by giving the instructions.

Moreover, a trial court's discretion will not be disturbed unless it resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) A miscarriage of justice occurs when it appears that a result more favorable to the defendant would have been reached in the absence of the alleged errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.) It is defendant's burden to demonstrate prejudice by establishing a reasonable probability that the asserted error affected the trial's outcome. (*People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

First, there is merit to respondent's contention that defendant has forfeited any claim of prejudice due to the timing of the aiding and abetting instructions. Defendant does not argue that he would have prepared or argued the case differently had the aiding and abetting instructions been given earlier. Indeed, when defense counsel objected to the instructions, he did not claim surprise, prosecutorial misconduct, or any need to investigate further or present additional evidence. Counsel merely stated: "[I]t's [the] prosecution's burden to present a theory for each count, and [as they] failed to do so, it's improper to reopen argument to allow them to present their theory." If counsel had been surprised by the new theory, he could have requested a continuance or moved to reopen the taking of evidence so as to present additional evidence or a different theory of defense. As he did not do so, defendant may not now claim that he was harmed. (See *People v. Memro* (1995) 11 Cal.4th 786, 869, overruled on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

Regardless, defendant has failed to meet his burden to demonstrate a reasonable probability that the timing of the instructions affected the trial's outcome. Defendant contends that the jury question indicated that the jury was not able to agree on whether defendant personally intended to sell the drugs in his possession,[4] and he argues that without the instructions on aiding and abetting, the jury might have been deadlocked. He

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[4] Defendant misapprehends the nature of the specific intent element of possession of narcotics for sale. See footnote 2, *ante*.

concludes that the trial court would then probably have declared a mistrial, which would have been a more favorable result. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520.) Such an argument does not relate to the *timing* of the instructions, but the effect of *any* instruction regarding aiding and abetting. However, defendant does not contend that the instructions incorrectly stated the law, that substantial evidence did not support them, or that he was entitled to have the jury left with a confusing or incomplete instruction regarding specific intent. We agree that as a general proposition, a confused and inadequately instructed jury might fail to reach a verdict; however, as respondent observes, there was no indication that this jury was deadlocked or even that there was any disagreement regarding defendant's guilt.

We discern no reasonable probability that the trial court would have declared a mistrial under the circumstances of this case, or that the trial court would have proceeded any differently had the jury declared an impasse. California Rules of Court, rule 2.1036 directs the court to determine the jury's specific concerns and what further action might assist the jury to reach a verdict, and permits the court to give additional instructions, clarify previous instructions, and permit additional closing arguments. (See also § 1140.) So long as the trial court remains impartial and noncoercive, the use of such tools and how to use them are matters left to the court's discretion. (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1087-1088.) Here, the trial court simply made use of the available tools *before* an impasse was declared, which was also well within its discretion. (See *Ardoin, supra,* 196 Cal.App.4th at p. 129, fn. 10.) In sum, a different outcome would not be reasonably probable, regardless of whether the trial court had given the instructions prior to the commencement of deliberations or waited until the jury indicated an impasse.

We conclude that the trial court did not abuse its discretion, and that the timing of the aiding and abetting instructions resulted in no prejudice to defendant under the standard of *People v. Watson, supra,* 46 Cal.2d at page 836. Further, if there had been constitutional error, we would find the timing of the instructions to be harmless beyond a reasonable doubt under the test of *Chapman v. California* (1967) 386 U.S. 18, 24, as the jury's verdict showed that it disbelieved defendant's claim of ignorance, and that it

determined that the quantity of narcotics indicated his intent to possess them "for sale." (*People v. Perez, supra*, 35 Cal.4th at p. 1231.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST